Nos. 04-19-00192-CR & 04-19-00193-CR

IN THE COURT OF APPEALS FOR THE FOURTH DISTRICT OF TEXAS SAN ANTONIO, TEXAS

JOHNNY JOE AVALOS,
Appellant

v.

THE STATE OF TEXAS,
Appellee

ON APPEAL FROM THE 437th JUDICIAL DISTRICT COURT OF BEXAR COUNTY, TEXAS
CAUSE NUMBERS 2016-CR-10374 & 2018-CR-7068

BRIEF FOR THE STATE

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ORAL ARGUMENT NOT REQUESTED

IDENTITY OF PARTIES AND COUNSEL

Pursuant to Tex. R. App. P. 38.2(a), the appellee supplements the appellant's list of parties as follows:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

NOTE ON POTENTIAL CONFLICT OF INTEREST

Attorney Mario Del Prado previously represented appellant in this case. However, Mr. Del Prado is now employed by the Bexar County District Attorney's Office as the Chief of the Criminal Trial Division. While a conflict of interest on the part of the District Attorney disqualifies all of his assistants, *see State v. May*, 270 S.W.2d 682 (Tex. App.—San Antonio 1954, no writ), the same is not true if only an assistant is disqualified. *E.g.*, *Marbut v. State*, 76 S.W.3d 742 (Tex. App.—Waco 2002, pet ref'd).

Here, however, in an abundance of caution, the Bexar County District Attorney's Office filed a recusal motion. (Clerk's Record in cause 2018-CR-7068, at 5-7; Clerk's Record in cause 2016-CR-10374, at 255-57; Reporter's Record of Feb. 19, 2019, at 4.) But, at the plea hearing, appellant's counsel waived any conflict of interest, and specifically stated that appellant had no objections to the Bexar County District Attorney's Office continuing the representation. (Reporter's Record of Feb. 19, 2019, at 4-5.) Thus, any potential conflict of interest has been waived or forfeited. *See, e.g., id*. at 749-50.

Moreover, undersigned counsel can attest that he has not discussed this case with Mr. Del Prado, and, to his knowledge, Mr. Del Prado has not discussed this case, including the appeal, with any other attorney in the Bexar County District Attorney's Office.

STATEMENT OF THE CASE

The State accepts appellant's Statement of the Case.

STATEMENT REGARDING ORAL ARGUMENT

Appellant has requested oral argument. While the issues presented are interesting, they can be addressed with reference to the record and briefs alone. Thus, oral argument would not significantly aid this Court's determination of the issues presented and should, therefore, be denied.

ISSUES PRESENTED

APPELLANT'S FIRST & SECOND ISSUES (combined and re-worded)
Section 12.31(a)(2) of the Texas Penal Code violates the federal and state constitutions because it imposes an automatic sentence of life without parole on intellectually disabled adults, such as appellant.

STATE'S RESPONSE
The federal and state constitutions do not prohibit imposing sentences of life without parole on any defendants, let alone the intellectually disabled. Moreover, while no controlling authority has ever directly addressed whether the *mandatory* imposition of such a sentence on intellectually disabled offenders is constitutional, this Court should hew to precedent holding or indicating such mandatory sentences are constitutionally permissible.

STATEMENT OF FACTS

The State challenges the factual assertions contained in appellant's brief. *See* Tex. R. App. P. 38.2(a)(1)(B). The State will supply supplemental pertinent facts supported with record references within its response to appellant's points of error. The Reporter's Record of February 19, 2019, is the only record relevant to this appeal, and it will be referenced as "RR."

SUMMARY OF THE ARGUMENT

To the extent appellant argues that life without parole cannot be imposed on intellectually disabled offenders because such offenders are essentially indistinguishable from juveniles, his argument must fail because the federal and state constitutions do not *per se* forbid sentences of life without parole for juveniles or any other offenders. Furthermore, to the extent that appellant contends that the federal and state constitutions require individualized assessments before life without parole can be imposed on intellectually disabled offenders, this Court should take a cautious approach and not impose such a rule because both controlling and persuasive case law weigh against requiring such assessments.

ARGUMENT

I. The mandatory imposition of life without parole on appellant was constitutional.

In both causes, appellant argues that § 12.31(a)(2) is unconstitutional as applied to him. Appellant's argument must fail.

a. Applicable law

An individual adjudged guilty of a capital felony in a case in which the State does not seek the death penalty shall be punished by imprisonment in the Texas Department of Criminal Justice for life without parole, if the individual committed the offense when 18 years of age or older. Tex. Penal Code Ann. § 12.31(a)(2); *see also* Tex. Crim. Proc. Ann. art. 37.071, § 1 ("If a defendant is found guilty in a capital felony case in which the state does not seek the death penalty, the judge shall sentence the defendant to life imprisonment or to life imprisonment without parole as required by Section 12.31, Penal Code.").

Here, the State did not seek the death penalty, appellant pled guilty to two counts of capital murder, and the trial court accepted those pleas and found him guilty. (RR 11-13.) As a result, the trial court sentenced him to life without parole. (RR 13-14.)

b. As-applied challenges and standard of review

Appellant asserts that § 12.31(a)(2) is unconstitutional "as applied" to him.[1] "A defendant raising only an 'as applied' challenge concedes the general constitutionality of the statute but asserts it is unconstitutional as applied to her particular facts and circumstances." *Modarresi v. State*, 488 S.W.3d 455, 465 (Tex. App.—Houston [14th Dist.] Houston 2016, no pet.) (citing *State* ex rel. *Lykos*, 330 S.W.3d 904, 910 (Tex. Crim. App. 2011)). "Because a statute may be valid as applied to one set of facts and invalid as applied to a different set of facts, a defendant must show that, in its operation, the challenged statute was unconstitutionally applied to her." *Id*. "A defendant challenging the constitutionality of a statute bears the burden to establish its unconstitutionality." *Id*. (citing *Rodriguez v. State*, 93 S.W.3d 60, 69 (Tex. Crim. App. 2002)). The constitutionality of a criminal statute is a question of law, which is reviewed *de novo*. *Id.*

[1] Appellant argues that § 12.31(a)(2) is unconstitutional under both the federal and state constitutions, and suggests that the state constitution should be read more expansively than the federal. However, the Court of Criminal Appeals has specifically rejected appellant's argument. *Cantu v. State*, 939 S.W.2d 627, 645 (Tex. Crim. App. 1997) (holding that there is "no significance in the difference between the Eighth Amendment's 'cruel and unusual' phrasing and the 'cruel *or* unusual' phrasing of Art. I, Sec. 13 of the Texas Constitution"). Thus, this brief will address both of appellant's claims as if they were one issue.

c. Appellant's sentence is constitutional

Appellant appears to argue two different things. First, he seems to say that the imposition of a sentence of life without parole on adults with intellectual disabilities, such as himself, is unconstitutional in all instances. He likens such individuals to juvenile offenders and relies on the Supreme Court's opinion in *Miller v. Alabama*, 567 U.S. 460 (2012). Second, he appears to argue that, even if such sentences are constitutional, they cannot be mandatory; that is, intellectually disabled offenders must receive an individualized assessment to determine whether such a sentence is appropriate. This brief will address both contentions.

1. The federal and state constitutions do not forbid sentences of life without parole for any offenders, let alone those with intellectual disabilities

Appellant twice states that the *Miller* Court held that a life-without-parole sentence imposed on juvenile capital defendants violates the Eighth Amendment to the United States Constitution. (Appellant's Br. 23, 34.) As recognized by the Court of Criminal Appeals, that is incorrect. *Lewis v. State*, 428 S.W.3d 860, 863 (Tex. Crim. App. 2014). "*Juveniles are still constitutionally eligible for life without parole,* but *Miller* requires an individualized determination that a defendant is 'the rare juvenile offender whose crime reflects irreparable corruption.'" *Id.* (emphasis added) (quoting *Miller*, 567 U.S. 479-80). Thus, to the extent that appellant is arguing that *Miller* forbids the imposition of life without

parole on him because it forbids such sentences on juveniles, and juveniles are sufficiently analogous to intellectually disabled persons, his argument is simply incorrect. As demonstrated, under the state and federal constitutions, even juveniles can theoretically receive a sentence of life without parole.[2]

2. The federal and state constitutions do not forbid mandatory sentences of life without parole for adult offenders

Further, to the extent appellant is arguing that he cannot be sentenced to life without parole without first receiving an individualized assessment, careful adherence to precedent does not support that contention. Appellant frames this case as one of first impression in the Texas. In the strictest sense that is true because the only other case to consider this issue—namely, that the imposition of a mandatory sentence of life without parole on a defendant with an intellectual disability constitutes cruel and unusual punishment—was unpublished. *Parsons v. State*, No. 12-16-00330-CR, 2018 WL 3627527, at *4-5 (Tex. App.—Tyler July 31, 2018, pet. ref'd) (mem. op., not designated for publication). But, it is still persuasive authority, and ultimately it rejected the claim appellant makes here. *Id*. Moreover, the Fourteenth Court of Appeals considered, but rejected, a nearly

[2] As a matter of Texas *statutory* law, life without parole is not an option for juvenile offenders. Tex. Penal Code Ann. § 12.31(a)(1). Instead, juveniles convicted of capital offenses receive a mandatory life sentence, *id*., and such a mandatory sentence is constitutional because "*Miller* does not forbid mandatory sentencing schemes." *Lewis*, 428 S.W.3d at 863. So, while the Legislature has seen fit to extend greater protections to juveniles than the constitution requires, it has not done so for the intellectually disabled. Whatever the merits of that decision, it is the Legislature's prerogative.

identical challenge involving a defendant with a mental illness. *Modarresi v. State*, 488 S.W.3d 455, 464-67 (Tex. App.—Houston [14th Dist.] Houston 2016, no pet.).[3]

Modarresi principally relied upon the Supreme Court's ruling in *Harmelin v. Michigan*, 501 U.S. 957 (1991).[4] *Modarresi*, 488 S.W.3d at 466. In *Harmelin*, the defendant argued that his sentence of life without parole for possession of cocaine violated the Eighth Amendment because the trial court was statutorily required to impose that sentence without considering mitigating evidence. *Id*. at 961-62. In rejecting that argument, the Supreme Court reiterated its previous holdings that a *death* sentence is cruel and unusual under the Eighth Amendment if it is imposed without an individualized determination that the punishment is appropriate. *Id*. at 995. However, the Court refused to extend that "individualized capital sentencing doctrine" to mandatory sentences of life without parole. *Id*. at 995-96. Simply, "under *Harmelin*, the Eighth Amendment does not afford a defendant who was an adult at the time of the offense the right to produce evidence of mitigating

[3] In *Modarresi*, "[i]t was undisputed that [the defendant] ha[d] Bipolar Disorder and was in a state of post-partum depression when she killed [her son]." *Modarresi*, 488 S.W.3d at 459.

[4] *Harmelin* was a largely fractured opinion. But the holding, the portions relied upon by the *Modarresi* Court, and the parts cited in this brief, all garnered a majority of the Supreme Court.

circumstances when the state seeks a life sentence without parole." *Modarresi*, 488 S.W.3d at 466.[5]

Appellant neither discusses nor cites *Harmelin*. But the thrust of his argument is that *Miller* abrogated *Harmelin*'s holding in cases involving intellectually disabled offenders. However, the *Miller* Court stated that its holding "neither overrules nor undermines nor conflicts with *Harmelin*." *Miller*, 567 U.S. at 482; *see also id*. at 480-82 (discussing the differences between adult and child defendants, and explaining that both death and children "are different"). Thus, this Court should not extend *Miller*'s holding in the face of *Harmelin*'s clear precedent that the constitution does not require individualized assessments of adults facing life without parole.

Appellant relies upon *People v. Coty*, 110 N.E.3d 1105 (Ill. App. Ct. 2018). However, *Coty* is currently pending before the Illinois Supreme Court, so it may not remain good law. *People v. Coty*, 116 N.E.3d 921 (Ill. 2019) ("Petition for Leave to Appeal Allowed."). But, more importantly, as appellant acknowledges, it only analyzed this issue under the Illinois constitution's analogue to the Eighth Amendment. *Coty*, 110 N.E.3d at 1117, ¶ 57 ("While we would reach the same

[5] Two other cases, while holding that the issues were unpreserved, considered in the alternative the constitutionality of the statute as it applies to non-intellectually disabled adults, and concluded in both instances that the statute does not impose cruel and unusual punishment. *Desormeaux v. State*, 362 S.W.3d 233, 240 (Tex. App.—Beaumont 2012, no pet.); *Wilkerson v. State*, 347 S.W.3d 720, 722-23 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd).

result under both the federal and state constitutions, because the defendant only raised the proportionate penalties argument in his motion to reduce his sentence, we will proceed with the merits of that claim alone."). Accordingly, its holding has no bearing on the issues raised by appellant under the federal and Texas constitutions. Also of note, *Coty* never discussed or cited to *Harmelin*.

Moreover, other states have rejected similar arguments. For example, the Massachusetts Supreme Judicial Court addressed this issue in the context of defendants with "developmental disabilities." *Commonwealth v. Jones*, 90 N.E.3d 1238, 1249-52 (Mass. 2018). After considering arguments very similar to the ones appellant makes here, it ultimately declined to extend *Miller*'s holding to such defendants.[6] *Id*.; *see also State v. Little*, 200 So.3d 400, 403-04 (La. Ct. App. 2016) (rejecting downward departure from a mandatory sentence of life without parole for a defendant with a developmental disability), *cert. denied*, 219 So.3d 341 (La. 2017); *Baxter v. Mississippi*, 177 So.3d 423, 447 ¶ 83 (Miss. Ct. App. 2014) (stating that the defendant's "intellectual disability only precluded the death penalty, not life imprisonment without parole"), *aff'd*, 177 So.3d 394 (Miss. 2015); *cf. State v. Moen*, 422 P.3d 930, 935-38 (Wash. Ct. App. 2018) (in a facial challenge, holding mandatory imposition of life without parole on a defendant with

[6] Massachusetts law distinguishes between "developmental disabilities" and "intellectual disabilities." Mass. Gen. Laws Ann. ch. 123B, § 1. But it is hard to see how a prohibition on mandatory life without parole would apply to an intellectually disabled offender but not one with a developmental disability.

dementia did not violate state constitutional analogue to the Eighth Amendment, and declining to address an Eighth Amendment challenge because state analogue provided greater protections than federal constitution), *pet. denied*, 439 P.3d 1063 (Wash. 2019).

The day may come when, like juveniles, the Supreme Court exempts the intellectually disabled from *Harmelin*'s holding—just as it exempted intellectually disabled offenders from the death penalty, *Atkins v. Virginia*, 536 U.S. 304 (2002). But, until further guidance is provided by the Supreme Court, this Court should chart a narrow path and, instead, follow the reasoning of, among others, the *Parsons* Court, which explained the differences between juveniles and intellectually disabled adults in the context of mandatory life-without-parole sentences. *Parsons*, 2018 WL 3627527, at *5. Therefore, this Court should be guided by courts taking a more cautious approach to this and related issues, and overrule appellant's arguments.

PRAYER

WHEREFORE, PREMISES CONSIDERED, the State of Texas submits that the judgment of the trial court should, in all things, be AFFIRMED.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Andrew N. Warthen, hereby certify that the total number of words in appellee's brief is 2,047. I also certify that a true and correct copy of this brief was emailed to appellant Johnny Joe Avalos's attorney, Jorge G. Aristotelidis, at jgaristo67@gmail.com, on this the 12th day of August, 2019.

/s/*Andrew N. Warthen*
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